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ABSTRACT

The effects of legislation, regulations, and case law on higher education administration is discussed, and projections are offered regarding tenure, collective bargaining, use of legal counsel, affirmative action, academic due process, torts, search and seizure, privacy, and the First Amendment. Ways in which administrators in colleges and universities may deal with critical issues growing out of legislation and litigation are addressed. The situation facing the college administrator is that courts and governmental agencies have far-reaching impacts upon policies, relationships, rules, and finances within educational institutions. The movement toward accountability is one of the reasons for increased court involvement and the resulting litigation in the community college environment. In a national survey covering the period 1973-75, state directors of community/junior college education were asked to respond to a questionnaire regarding the amount and type of state legislation affecting their areas of operation. The most critical areas influenced in the opinion of the respondents were fiscal support and management. Closely related to both of these areas were concerns about institutional growth and governance. The litigation issue has had the most impact on the community/junior colleges. In the last two decades the demand for community colleges to provide more programs in more areas has resulted in an increase in federal government involvement. (SW)

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LEGISLATION, LITIGATION

AND

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Legislation, Litigation
and
The Administration of Higher Education
An
Abstract

Administrators in higher education may not be under the gun but they are certainly under the gavel.

Three decades of legislation, regulations and case law have transformed higher education into what Clark Kerr has termed an increasingly quasi-public utility. One result of this unsought status is that the college administrator is more and more often caught between more and more rocks and very hard places.

This essay examines some of the recent history of this situation, identifies some documentable impacts of legislation and litigation, and offers the administrator some projections regarding tenure, collective bargaining, use of legal counsel, affirmative action, academic due process, torts, search and seizure, privacy and the First amendment.

A concluding section suggests some ways in which administrators in colleges and universities may deal with critical issues which grow out of legislation and litigation.

Legislation, Litigation
and
The Administration of Higher Education

For the last three decades the full spectrum of post secondary education has absorbed accelerating federal and state regulation of college policies and practices. Administrators throughout higher education have come to recognize a sometimes painful fact of educational life - courts and governmental agencies have far-reaching impacts upon policies, relationships, rules, and finances within educational institutions. The law and its relationship to higher education has become a critical concern to college and university administrators.

It Didn't "Just Happen"

Clark Kerr, while chairman of the Carnegie Commission on Higher Education put the issue in stark, succinct terms.

Higher education [has turned] increasingly into a quasi-public utility with its prices (tuition and budget) controlled outside the campus, its services (functions) specified, and its customers (through admission policies) determined; and with outside agencies also prepared to hear complaints about prices, services, and the acceptance and rejection of customers. The campus is less part of free enterprise and more part of the controlled public domain.¹

Kerr's comment, while directed at all of higher education, could just as well have been focused on the community/junior colleges for prior to WWII very little legislation could be identified as affecting post-secondary, non-university education. At that time, almost all public junior colleges were administered by a public school district or they were branches of state universities, as was the case in Kentucky, Nevada, Alaska, and Hawaii. In the states of Illinois, California, Mississippi, Florida, and Maryland local school boards governed the junior colleges and established policy, controlled expenditures, and determined programs.²

In 1948, however, a new thrust for post-secondary education emerged due to the demand for lower cost vocational training and more opportunity for education for all adults. The new thrust enjoyed the support of the President's Commission on Higher Education.

Whatever form the community college takes, its purpose is educational service to the entire community, and this purpose requires of it a variety of functions and programs. It will provide college education for the youth of the community certainly, so as to remove geographic and economic boundaries to educational opportunity and discover and develop individual talents at low cost and easy access. But in addition, the community college will serve as an active center of adult education. It will attempt to meet the total post-high school needs of its community.³

Thus encouraged, states enacted legislation to establish the community college as an institution independent of existing educational structures. From this legislation emerged three distinct types of governing structure: (1) separate local boards of trustees with some state and local funding, (2) state sponsored and funded community college systems, and (3) comprehensive community-based institutions, developed from those previously sponsored by state universities.⁴ These state-created institutions were variously controlled by three types of authority: governing bodies, governing/coordinating bodies, and coordinating boards. Researchers have been unable to document that one type of authority is superior to the others; however, it is generally conceded that as governance from the state level increases, the ability of the community/junior college to respond to community needs and input decreases unless the college has maintained strong liaison relationships with state agencies. In some cases, as in Florida, there exists state funding for operating and capital costs, but institutional policy jurisdiction rests with a local board of trustees.⁵ It is also generally conceded that as the volume of state and federal legislation impacting community/junior colleges increases, state and federal controls expand at the expense of local influence, hampering the effectiveness of the institutions to

provide community post-secondary education in response to local demands.

In concert with the accelerating volume of legislation affecting community/junior colleges, litigation has also rapidly increased and a number of authors have sought to explain the significant surge of court cases involving higher education institutions.

One community college administrator, Lahti, refers to a model developed by J. Victor Baldridge in the book Academic Governance (Berkeley: McCutchen Publishers, 1971). This model purports to explain the process of academic governance in a political context. Lahti paraphrases Baldridge and explains the model as a representation of how "pressure is brought to bear on the decision-making process." According to the author, this process goes through evolutionary increments involving four steps: social context, interest articulation, legislative transformation, and policy. Each of these steps becomes more complex and political in nature. It is the manifestation of various issues and interests during this evolutionary process, that frequently takes the form of legalistic involvement, situations, and outcomes.⁶

Shur and LeBlanc, University of Maine counsel, have commented on a potential cause for litigation that affects, and is often directed against, faculty members at institutions of higher education. This cause might simply be termed clientele sophistication. The attorneys refer to the clientele with whom a faculty member usually associates. Their comment is that "the academic community presents unique problems. The people with whom the professor deals are generally more sophisticated and inclined to litigation."⁷

The Vice-President for Programs of American Association of Community and Junior Colleges identifies a sociological pattern involving litigation and recently wrote that "accelerated changes and legal issues seem to go hand in

hand. Arguments as to which is cause and which is effect, or whether both are effects of some other development, are moot, when confronted with a real and critical issue."⁸

West follows up on this trend from research he conducted while at the University of Massachusetts. In his study of the constitutional rights of college students, West has stated "a growth in individual rights, a new awareness of the law as it affects the individual, and changes in societal values since World War II, have combined to effect a change in the college-student relationship. The Constitution and the courts have come to campus."⁹

Similarly, California State University Counsel Epstein relates three reasons for the increase in litigation. He states these complex issues as:

- (1) Availability of counsel to individuals and groups, who as a practical matter, were not able to secure effective legal counsel representation in the past.
- (2) The advent of class-action lawsuits which, even with recent limitations, provide a means to get at issues which were impractical to raise before, and
- (3) The coincidental multiplication of the range of cognizable actions and remedies for those actions, as well as agencies established to pursue them.¹⁰

All of these reasons have been the focus of a new trend in law known as public interest law - a branch of law that came to the forefront in the 1960s, and has been significant in all sectors of contemporary American life since that time. There are no denials that many contributions have been made to society by public interest law. However, some of its underlying philosophy tends to account for the zeal and frequency with which people now resort to litigation.

Penn, New Jersey Director of the Division of Public Interest Advocacy, perceived the development of public interest law assisted by three factors that he lists as:

- (1) The widespread growth of legal representation for individuals who had previously been unrepresented, paved the way for representation of class interests.
- (2) The 1960s saw a perceptible shift in the public's attitude toward its institutions. People began to question authority and demand answers to multiple problems, and
- (3) The law was developing in line with the public's concern with the failure of its institutions.¹¹

Stein observed that public interest law received its impetus from the work of Nader in the early 1960s. The perception of the philosophy of the Nader movement was that "not only did certain groups receive an unfair shake, everyone did."¹²

Stein continues with comments from the writings of two public interest lawyers, Charles Halpern and John M. Cunningham, in the May, 1971 issue of the Georgetown University Law Review. These attorneys outlined the philosophy and necessity of public interest law when they wrote that

.....the underlying commitment of the new practice [public interest law] is not to specific social platforms, whether liberal or conservative, it is rather to the adversary system itself and specifically to that principle that everyone affected by corporate or bureaucratic decisions should have some voice in the decisions, even if he cannot obtain conventional legal representation.¹³

Stein helped to clarify the adversary role of litigation when she stated that "there has been little voluntary change on the part of the government or industry, that they have reformed only when put under the gun by public interest law."¹⁴

Lakes, Chief Counsel, Senate Subcommittee on Constitutional Rights, feels that public interest law serves as a counterbalance against organizational inertia or arbitrariness. She writes that "tension in the multifaceted relationship of government and the public interest law is a healthy one, in many ways analogous to the 'checks and balances' built into our system of government by

the Founding Fathers. As the size and influence of government increases, so public interest advocacy must expand."¹⁵

Leslie and Satryb follow this parallel, saying that there is a frequent resort to the use of attorney. In their commentary they hold that "the right to an attorney or advisor has become a popular issue in recent years"¹⁶

Rosenblum's assessment of litigation affecting higher education is based partially on the increasing role of federal agencies in higher education.

The vast increase in recent years in efforts by federal agencies to regulate college policies and practices is final proof that the era of 'splendid isolation' of our colleges is over. Regulatory actions by federal agencies have multiplied, along with the heightening of judicial interventions into campus affairs, at the behest of disgruntled students or staff members and as an inevitable consequence of expanding government grants and contracts.¹⁷

A-University of Maryland official, Blummer, discusses some of what he referred to as "the broad implications of federal statutes and regulations and increased activity of the courts in campus matters" as bearing a positive relationship to the increase in litigation.¹⁸

This new activism or advocacy has generated considerable discussion within the legal profession as a question of ethics and is frequently a source of controversy in the scholarly and popular legal literature. Carried to the extreme, the issue is simply "litigation for litigation's sake." Shur and LeBlanc are proponents of the respected concept known as preventive law as opposed to the frequent predisposition to resort to lawsuits and litigation for the resolution of nearly every controversy, as is sometimes happening.¹⁹

Resorting to litigation and use of attorneys by students and other parties with grievances became highly visible in the 1960s. This pattern followed slightly and then began to parallel the movement of civil rights,

rights of the criminally accused, and rights of the convicted. The late legal scholar, Hazel Kerper, termed this phenomena in the law as the "criminal law revolution."²⁰

This frequency or propensity for legal action and the involvement of attorneys in educational issues was noted by several researchers. Jackson and Richardson have noted the issue of professional legal counsel at campus judicial hearings.²¹ O'Neil comments that laymen have "little appreciation of the enormous cost of going to court." His reference to costs goes beyond just expenditures for operations to include social and opportunity costs.²²

Writing in an American Association of Community and Junior Colleges monograph, Bender has analyzed the regulatory sanctions that have accompanied so much of the federal legislation that makes an impact on community colleges. He also made reference to "the activist participation of state and federal courts in areas which formerly had been perceived as private domains of higher education."²³

Bender suggests the movement toward accountability is one of the reasons for increased court involvement and resulting litigation in the community college environment. According to Bender,

The age of accountability came rapidly as courts delegated new forms of government regulations and requirements to provide for consumer protection demands where institutions had previously assumed the prerogative of determining output was theirs in that the student had traditionally been subject to the highest principles of in loco parentis, rather than a consumer with all the rights and privileges assured by the judiciary.²⁴

The judiciary also assured American higher education that litigation, like budgets, students and alumni, would be a continuing part of the campus scene.

Components of the Issue

In a national survey covering the period 1973-75, state directors of

community/junior college education were asked to ~~respond~~ to a questionnaire regarding the amount and type of state legislation affecting their areas of operation. Of almost four hundred legislative acts reported, the most critical areas of college operations influenced in the opinion of the respondents were fiscal support and management.²⁵ Closely related to both of these areas were concerns about insitutional growth and governance. College administrators are increasingly called upon to deal with agencies of government regarding the finance, governance, and growth of community/junior colleges, as well as in areas of personnel management. They are required to face questions such as: How can adequate program funding be obtained? Under what restrictions? For what span of time? Who, in fact, controls the policy-making at the institution; is it the state agency or local board? How much federal control of programs and expenditures is advisable? What personnel matters are negotiable? What are the personal rights for faculty members, students, staff, and the administrators? On what information can long-range plans and goals be established?

There are variations in the literature regarding the identification of the specific legal elements that are components in the broader community college litigation issue.

Bender, for example, has outlined a "broad range of issues related to students which probably would not have been considered by the courts ten to fifteen years ago" and further comments that "comparable lists could be developed related to personnel (faculty and staff), programs, and other areas of college operations that have become litigation issues."²⁶

O'Neil, in a Committee for Economic Development monograph, identified such issues as these:

.....legality of dormitory searches, confidentiality of student files and records of student organizations, recognition and status of student political groups, administrative control over campus newspapers and other publications, access of insiders and outsiders to campus facilities for meetings and rallies, denial of enrollment in or credit for particular courses as well as degree programs, withdrawal of student government positions or offices from alleged campus wrongdoers, and other comparable issues.²⁷

Robinson's research added still other issues he perceives to be significant, issues of racial discrimination, reverse discrimination, expulsions for academic reasons, student financial aids, mandatory dorm and board requirements, tort liability, free speech, disciplinary rules, and security.²⁸

Similarly, Jackson and Richardson's methodology involved a review of the relevant literature from which they developed what they labeled as the "eighteen most prevalent legal issues on campus." Their survey instrument included many of the issues previously identified, adding:

- lawful authority of the college to govern its constituency, eighteen year olds as legal adults, placement upon graduation, professional legal counsel at campus judicial hearings, liability of student personnel workers, capricious grading on the part of faculty, contract theory upon admission, and concurrent jurisdiction.²⁹

Bonanno's work on academic due process also provides some insight into specific legal issues that have resulted in litigation. This Florida State University official adds "course credits, cheating, granting of degrees, and several others."³⁰

Blummer's intent, in an American Association of Community and Junior Colleges publication, was to identify the many legal pitfalls that have tended to "increase the importance of legalisms and legal relationships in the day-to-day working environment of the community college."³¹ Blummer's list includes many previously identified issues plus others. His list contains issues involving faculty and administration, including

.....new affirmative action programs, new ethical and conflict

of interest considerations, financial exigencies at many institutions, weakening of the in loco parentis doctrine in college-student relationships, increasing unionization of public employees, increasing centralization and codification of rules and regulations governing higher education, federal and state equal pay provisions, new health and safety laws, applicability of higher education to new Internal Revenue Service interpretations, various judicial doctrines applicable to campuses, and the increasing number of lawsuits against institutions, faculty members, and administrators.³²

Due to the variety of specific issues with relevance to college administration and litigation, this paper will use a simplified, eclectic classification system to focus on the specific components. The agenda of the 1974 Georgetown University Workshop entitled "Legal Problems in Higher Education" provides a useful way to analyze the components of the litigation issue and will be referred to as the Georgetown University Workshop Classification.³³ A modified version of the basic agenda follows.

1. Tenure and Tenure Quotas.
2. Collective Bargaining and Contracts.
3. Role of College Counsel.
4. First Amendment Rights.
5. Privacy and Confidentiality.
6. Tort Liability.
7. Affirmative Action and Minorities.
8. Academic Due Process for Students.
9. Search and Seizure.

Documented Impacts of the Issue

Nowhere in higher education has the litigation issue had more impact than in the community/junior colleges. In the last two decades the demand for community colleges to provide more programs in more areas has resulted in an increase in the federal government involvement in education through legislation designed to provide funds for expansion of facilities and services. Faced with the need to double the physical capacity of the facilities within a ten-year period, community/junior college administrators were pressured to declare their institutions components of public school districts in order to

be eligible for the funding provided by laws such as the National Defense Education Act of 1958.³⁴ This legislation provided for state agencies to be created to administer the program, and established the pattern which remains prevalent twenty years later. Needing funds, administrators have been willing to relinquish self-direction to state agencies and federal regulations in order to obtain financing for buildings and programs.

The extensive federal vocational legislation in the decade of the 1960s made available funds for classrooms, laboratories, and libraries to meet the increasing enrollment.³⁵ Funding available from both the Vocational Education Act of 1963 and the Manpower Development and Training Act of 1962 provided for classroom occupational training and related support services, as well as for retraining for the unemployed needing new job skills.³⁶ The Vocational Education Amendments of 1968 expanded the funding to include programs for consumer and homemaking education and for curriculum development. The separate administrative structure for vocational education containing federal, state, and local components, added more restrictions with which community/junior college administrators had to comply.³⁷

The community/junior colleges had plenty of good company however courtesy of the Higher Education Facilities Acts of 1963, 1965, and 1967 which provided partial funding for libraries and specialized facilities to meet the "urgent and great need to educate American youth for the security and welfare of the United States."³⁸ However, as more legislation produced more possible sources of funding, it also produced more regulations which had to be met by the participating institutions. New state commissions were created to develop the criteria for awards and to gather reports from institutions. The Higher

Education Act of 1965 provided for improved community-service and continuing education programs, library materials and services, cooperative programs between developing institutions, and student loans and grants.³⁹ It also provided for new agencies to administer the funds.

The two major concerns of college administrators, funding and governance, operate in tandem when federal legislation is involved. According to Bender "every federal program from 1963 included some provision for creating or strengthening state level administrative units. Even the evaluation process of these agencies and the legislature tend to restrict local decision-making by evaluating administrative decisions and operations through standardized criteria which may or may not take into account community differences or the educational value of the action."⁴⁰

Federal legislation relating to the management of personnel matters is less specifically aimed at educational institutions than is legislation of finance, but it too requires close scrutiny by higher education administrators for the vast majority of cases in litigation involving individual suits against colleges are based on civil rights legislation. Case law involving these civil rights issues will be discussed in following pages.

In matters of personnel, the college administrator must be aware that decisions can involve not only state education agencies, but the National Labor Relations Board, Equal Employment Opportunity Commission, Department of Health, Education, and Welfare, and those agencies concerned with individual rights which are protected by the Constitution. Decisions involving collective bargaining, tenure, equal rights for minorities, affirmative action, academic due process, search and seizure, and academic freedom may be appealed through one or more of the agencies mentioned.

By decision in 1970, the National Labor Relations Board extended its jurisdiction to cover private institutions of higher education. Approximately eighty-five percent of the eligible institutions representing ninety-five percent of the faculty in private institutions are covered by the National Labor Relations Act, giving the faculty the right of collective bargaining.⁴¹ A survey conducted by the American Association of Community and Junior Colleges and the Collective Bargaining Information Service drew responses from eighty percent of the nation's community and junior colleges. Approximately twenty-five percent (223) of the responding institutions were unionized through state enabling legislation.⁴² State governments presently contend that in the absence of specific enabling legislation, public employees including higher education employees, do not have the right to bargain collectively. However, in each of the last three congressional sessions bills have been introduced which would preempt existing bargaining legislation by extending the National Labor Relations Board jurisdiction to include public higher education and by extending bargaining rights under a new agency, the Public Employment Relations Commission.⁴³ The passage of either piece of legislation would carry broad implications for post secondary education and create severe dislocation in those states with statutes prohibiting collective bargaining by public employees. A discussion of the impact of case law involving collective bargaining rights is presented later in this section.

The subject of tenure - who gets it, the length of the probationary period, and the percentage of total faculty members who may be tenured - is under the control of state regulatory agencies. Tenure as an aspect of academic freedom is protected under the First Amendment to the Constitution.⁴⁴

It is crucial that college administrators develop institutional policies which outline these regulations to give protection to the college as well as advance information to faculty members who will become concerned in the issue.

Currently the Civil Rights Office of the Department of Health, Education, and Welfare is aggressively seeking out those institutions which have no established affirmative action guidelines for hiring personnel.⁴⁵ The affirmative action provisions in the Education Amendments of 1972, the Equal Pay Act of 1973, and the Equal Employment Opportunity Act of 1972 are all used as basis for improvement in the hiring practices for minority races and women. The Civil Rights Act of 1964 forced states to submit plans to federal agencies for total desegregation of educational institutions, with the progress carefully monitored by agencies established for the purpose.⁴⁶

Other personnel management problems may arise from the provisions of the Freedom of Information Act, the Buckley Amendment (Education Amendments of 1974), or from the Family Educational Rights and Privacy Act of 1974. This legislation was passed to protect confidential records, provide for public access to stated types of information, and establish parameters for family access and use of school records. Inappropriate release or withholding of requested records in violation of any of these laws subjects the college administrator to possible court action.

In areas of program development and expansion, funding may become available through federal or state appropriations of a designated legislative act. However, consideration must be given to the conditions under which federal funds are frequently awarded. The funds are awarded for a specific span of time or for a specific project, after which time the institution may be expected to continue any financing needed. Federal assistance frequently

covers only partial costs of a program, requiring the institution to commit funds for the remaining costs. The advisability of initiating a program using "soft" money must be carefully evaluated in terms of long-range financial obligations after federal support has been terminated.

Administrative decision-making relative to tenure is another highly litigious area, mainly because of the involvement of procedural and substantive due process rights of faculty. The courts have ruled in three main decision-making areas involving tenure: (1) processes and procedures necessary for the non-renewal of a probationary professor's contract, (2) the grounds and procedures necessary in the dismissal of tenured faculty, and (3) in cases of financial exigency, the procedures necessary and reasonable for the discharge and dismissal of faculty members.⁴⁷ Court rulings place the burden of proof on the institution in the latter two instances, and in certain instances, on the former.

"Faculty members in public institutions have substantive and procedural due process rights, and a failure to extend these rights properly to faculty places schools in breach of contract and/or in violation of the law."⁴⁸ Court rulings over the past years have increasingly expanded due process rights.

Administrators can suffer personal liability for action that is in violation of the Constitution, and in many cases, are personally liable for breach of contract.⁴⁹ One consolation is that the courts have been reluctant to substitute their judgement in place of the professional judgement of the college where a clearly written framework for decision-making exists and where uniform and consistent application is practiced.⁵⁰

With reference to tenure quotas, the significant decision-making features that correspond with litigation are two-fold. One element involves the impact of tenure quotas on minorities and women, while another element is the allegation that non-selection under tenure quota is "frivolous and capricious."⁵¹ Consequently, administration decision-making under the scope of tenure quotas is threaded with pitfalls involving due process, constitutional, and civil rights implications.

Collective bargaining is a significant decision-making proposition for administrators, given the rise of faculty unionism in higher education and increasing collective bargaining legislation. Several notable impacts on decision-making are:

- (1) An increasing adversarial relationship between faculty members and administration, strained financial resources to meet the requirements of the negotiated contract, and a threat to the heuristic process of seeking truth in a climate of learning;
- (2) The court's involvement in institutions has resulted in a general restriction of the powers of governing boards and a general expansion of the rights of faculty and students; and
- (3) Board members and administrators of public community colleges can be held individually liable for their actions against students and faculty members."⁵²

Many administrators, not yet bound by the mandates of collective bargaining, have seen a necessity to make operative institutional dispute settlement and grievance procedures.⁵³ Also, where there is collective bargaining, there are claims that it has impinged on management by:

- (1) Giving faculty an increasing role in governance;
- (2) Changing relationships among administrators, imperiling second and third level administrators who have minimal influence during negotiations; and
- (3) By creation of employee bargaining groups, a new bureaucracy has been created within the institution.⁵⁴

Several other notable impacts are cases where management rights are actually made clearer, written down, and more easily carried out. Other

observations are a loss of respect for the authority of administrators and for the administrators themselves as a result of direct bargaining, cases where internal governance power has been bargained away by administrators to save money on a contract settlement. Other instances deal with interference or threatened retaliation against institutional programs by governing elements.⁵⁵

The need for counsel is specifically related to administrative decision-making. This importance is concisely stated by Epstein in this message to college administrators.

You need counsel as to the degree of risk and the quality of risk with respect to whatever it is you are about to undertake. The 'degree of risk' inquires as to the likelihood that the action will be upheld in the event of a challenge, and the 'quality of risk' inquires as to possible adverse consequences should a challenge be successful. You need advice going to the entire range of alternatives available, so that you can make an informed selection of a course of action.⁵⁶

Certainly one of the strongest themes appearing in discussions of higher education law is the need for, and the use of, counsel by the administrator.

Numerous court holdings have appeared against colleges in First Amendment rights cases, primarily those dealing with free speech, assembly, campus speakers, and campus publications. At the same time, there have been holdings for colleges under the legal test of "balancing of societal needs." The impact produces perplexity in the administrator in a time that First Amendment rights for students and all citizens is undergoing change - change which has the college administrator walking a tightrope. Epstein made the point when he wrote:

It becomes the duty of a college administrator at all publicly funded colleges to be able to distinguish between those circumstances where the exercise of First Amendment freedoms may not be lawfully curtailed and those other circumstances where such a curtailment would not only be consistent with the Constitution, but also may be required by law.⁵⁷

Making such distinctions is not an easy task.

Privacy and confidentiality are components with extensive legal implications the most notable of which is the need for institutional decision-making and procedures to operate within the limitations of the Family Educational Rights and Privacy Act of 1974. Administrators must make policies and subsequent decisions related to these policies governing personnel records access; adding, challenging, and removing documents, and interpreting the many laws and regulations related to access. There have been court rulings against institution record management policies and practices, and there are implications of liability and criminal sanction for disregard for the laws of privacy and confidentiality.⁵⁸

Tort liability is indeed a critical decision-making issue for administrators. Many writers report existing and potential legal liabilities of faculty, administrators, and trustees for torts. A growing number of cases is developing in higher education. "The doctrine of sovereign immunity has been abrogated or significantly eroded in most states."⁵⁹ "There are many reported cases where an injured party has attempted to hold college officials personally liable for either torts committed while acting in an official capacity or the torts of other officials generally."⁶⁰

The issue of affirmative action has been one of the most complex for administrative decision-makers. Higher education institutions are all under the mandates of Executive Order 11246 and Title VII of the Civil Rights Act of 1964. Consequently, by laws, goals, timetables for plans, and written plans for action must be developed. It has been reported that preparing plans is not nearly so difficult as the implementation.⁶¹

On the one hand, administrators are comforted by the doctrine that repeatedly in employment discrimination litigation, the federal courts have held that the exercise of subjectivity of judgement is not invalid in the absence of a demonstration that such judgement is

employed with a sex, race, or ethnic bias.⁶²

While the above has provided some rationale and guidance for administrative compliance, the issue becomes clouded with several other unsettling matters such as the appearance of cases alleging reverse discrimination, the holding in the case of Griggs v. Duke Power Company dealing with necessity of job relatedness in hiring criteria; and the possibilities of personal liability for school officials' actions which deprive individuals of civil rights, as decided in the case of Wood v. Strickland. It is generally concluded that the Strickland test of personal liability can be evoked against an administrator in the case of unlawful employment action by an employer taken in bad faith.⁶³

Substantive and procedural due process rights granted under the Fourteenth Amendment, as applied to the individual, continue to be broadly interpreted within the case law and various judicial holdings. The erosion of the in loco parentis doctrine, litigation in higher education, and the rights of eighteen year olds are all working to check "arbitrariness" in administrative decisions. Higher education institutions are finding themselves in situations requiring more formalization of nearly every consequential administrative action or process that deals with students. Administrators are finding a need to rely on counsel and the precedents of case law in order to keep up with or stay ahead of the evolving tests and doctrines dealing with student rights. The nature of administrative decision making is taking on a new dimension based upon a court holding that "a court is justified in intervening where school authorities had acted arbitrarily and capriciously."⁶⁴

The problems of search and seizure are compounded with evolving court decisions against college officials and expanding case law and holdings

dealing with the Fourth Amendment. Some courts are holding the necessity of a search warrant, and the applicability of limitations of the exclusionary rule to actions by college officials. Accompanying such restraints are potential criminal and civil sanctions against administrators for constitutional violations of individuals' Fourth Amendment rights.

Probable Impacts of the Issue

The review of the literature can only allow for speculation as to the future of the relationship between the law and higher education administration. The patterns that have developed and predictions from researchers indicate the following possibilities.

Tenure and Tenure Quotas:

1. Tenure systems may or may not be accompanied by strong evaluation systems.
2. Community colleges may or may not begin to look at alternatives to tenure quotas, such as steady state staffing.
3. Allshouse predicts increased adversarial relationships between those who wish to maintain the status quo and those wanting change in inefficient ways.⁶⁵

Collective Bargaining and Contracts:

1. Cleveland and Fox :
 - A. There will be increased collectivization of all employees.
 - B. Passage of a national collective bargaining act is expected.
 - C. A decision will be made as to whether the national collective bargaining act will include provisions allowing for strike.
 - D. There will be increasing state involvement in traditional academic decision-making.
 - E. Pressures will be brought on governing boards to increase productivity in community colleges.
 - F. Administrators will need to undergo study and training to deal with the trend toward unionization and its consequences.⁶⁶
2. St. John:
 - A. Collective bargaining on campuses will increase faculty participation in the governance process, increase faculty salaries, and collective security through negotiated contracts.
 - B. Governance of the colleges will not be solely a matter of discretion by administrators or trustees, but must conform to requirements of the particular state, congressional and state legislative statutes, the particular laws of collective bargaining, the faculty handbook, and rules and regulations of the institution relating to faculty employment.⁶⁷

3. Cohen and Associates:

Their prediction is that we may be heading toward a situation in which administrators will become ministerial officers implementing provisions of contracts.⁶⁸

4. O'Neil:

The spread of collective bargaining will reduce litigation by faculty, but may increase litigation against faculty.⁶⁹

Counsel:

1. Increased use of counsel will prevail stressing preventive law, and counsel will become more involved in all phases of institutional decision-making down to and including faculty.

2. O'Neil predicts that the high cost of litigation will tend to deter the resort to the courts by all parties, while the impact of each court decision will widen and the prospect of suit will accordingly shape the conduct on each campus.⁷⁰

First Amendment:

1. Ryskamp and Simon predict a dynamic change in the scope and meaning of the First Amendment.⁷¹

2. Hasselbrinck states that courts may or may not expand the meaning of academic rights as they relate to the First Amendment.⁷²

3. Jackson and Richardson predict that the rights guaranteed under the First Amendment will maintain their legal status on campus.⁷³

Privacy and Confidentiality:

1. The courts may or may not increase the liability and sanction against administrators for civil or constitutional violation of privacy rights.

2. The laws, rules, and regulations in this area may become more complex.

3. The need for a legally defensible records management system will likely increase.⁷⁴

Torts:

Tarbert:

1. Colleges and universities face increasing expense and exposure to institutional liability.

2. Cost of litigation and indemnification will continue to rise.

3. There may or may not be an expansion of personal liability for administrators.

4. There may or may not be a continued weakening, and may possibly be a strengthening, of sovereign immunity.⁷⁵

Affirmative Action:

1. Blummer:

The costs of compliance will continue to be expensive.⁷⁶

2. Hornby:

There will be more cases and case law dealing with reverse discrimination, and legal complications will hamper the process of selecting students for admission.⁷⁷

3. Bickel and Bender:

The vitality of affirmative action programs may be seriously affected by economic austerity.⁷⁸

4. Cohen and Associates:

A. Compliance with affirmative action may lead in the next few years to a conflict between associations that represent women and those that represent minority groups.

B. The most significant ramifications of affirmative action may be yet to come; and compliance with these regulations will lead either to the end or transfer of tenure. Tenure is viewed as a block to affirmative action.

C. There will be increased reliance on job-related criteria.

D. Affirmative action on college campuses will be effective when attitudes change, and then it will no longer be needed.

5. O'Neil:

Criteria which restrict access to higher education will be increasingly challenged and sustained only to the extent that they represent valid educational interests.⁸⁰

Academic Due Process:

Jackson and Richardson anticipate that due process under the Fourteenth Amendment will continue its strength in the academic community.⁸¹

Search and Seizure:

Jackson and Richardson forecast that the protections afforded students under the Fourth Amendment will significantly strengthen.⁸²

In order to relate these forecasted impacts on administrative decision-making, it is important to remember that interpretations of the law are always in a state of flux. Certain trends that seem likely may in fact, take a reverse. Decision-makers will be particularly interested in the trends of personal liability cases dealing with torts, civil, and constitutional rights. Also significant will be the need for the on-going assessment of the role of

the community college administrator in light of the impositions on his powers through courts, legislation, federal regulations, and faculty and student involvement in governance.

Administrative Solutions to the Issue

The impacts of the interrelationship of federal, state, and local involvement in higher education indicate several methods of administrative action. Relatively few states allocate funding to institutions by a set formula based on indiffereniated full-time enrollment, but increasingly on the basis of program costs and evidence of need.⁸³ According to Medsker, for example, there are twelve states in which two-year colleges are fully controlled by the state, with the remaining states partially controlled by the state.⁸⁴ Since some of the operating costs are state funded, regardless of the type of legal control in public community/junior colleges, the kind of relationship between administrators of these insitutions and state funding agencies often determines the level of appropriation awarded a college.

Albert H. Quie, a member of the Education and Labor Committee responsible for the passage of the Education Amendments of 1972, expressed concern about the lack of communication between educators and Congress. "Few administrators communicate with Congress, and those who do provide too little information and at inappropriate times."⁸⁵ Compared to city governments and other areas of interest, input to legislators from educators is extremely small. The needs of higher education must be placed before legislators who can deal with those needs if results are to be expected. Since 1966-67, the revenue to support colleges has come increasingly from state sources.⁸⁶ This increasing dependency upon state funding, occurring at the same time that state and federal budgets for education are being cut, makes college input to legislators

crucial. The trend for more strict accounting of expenditures by colleges is evidenced in recent legislation in New York, Maryland, Washington, California, and Massachusetts. Line item budgets have begun to appear in California, which gives the Governor and legislature more control over community college programs. Increasingly, state agencies review and approve college budgets, ending the possibility that college authorities have autonomy in developing budgets and administering expenditures in accordance with their own priorities.⁸⁷ The administrator who fails to keep the needs of his college before state officials jeopardizes the rate of development and growth of his institution.

In the case of community/junior colleges the interaction of federal, state, and local boards also carries with it the possibility of conflicts among agency officials which can catch the college administrator in the middle. The power struggle may involve directors of vocational education, executive officers of coordinating and governing boards, state governors, legislators, and federal agency officials, all demanding compliance by the college administrator with the directives of each agency.⁸⁸ Federal directives to community colleges or to coordinating boards may at times be in contradiction to the guidelines of another agency. Such is the case now before federal courts involving the Department of Health, Education, and Welfare and the Mississippi Junior College Commission regarding the authority to establish and carry out a desegregation plan for the colleges in that state.⁸⁹ This complexity of community/junior college control and funding and the conflicting span of authority necessitates constant monitoring and awareness of the actions of federal and state agencies concerned with educational institutions.

How does one maintain this awareness? In view of the complexity of the law as it affects higher education, no administrator should attempt to deal with the issue unaided. In order to be prepared to meet or anticipate situations involving the law, several courses of action are available to the administrator.

First, the administrator should consult regularly with colleagues in similar institutions, with professional associations, and with college attorneys regarding pending legislation, current federal, state, and local administration structures, current appropriations for on-going legislative enactments, and the philosophical orientation of various legislative personnel involved in educational issues.⁹⁰

Secondly, when a governmental agency acts or contemplates action against an institution, the administrator may request that the agency provide (1) a statement of the agency's statutory responsibility, (2) the reasons and purposes behind the contemplated action, and (3) the procedures for notice, hearing, appeal, and access to its records.⁹¹

Third, immediately consult the college attorney at any time legal action is imminent.

Fourth, stay abreast of legal developments through the systematic reading of professional journals, newsletters, and legislative digests.

Fifth, in matters of funding, program approval, enactment of new legislation, and institutional control, personal contact with officials at the state and federal level who have jurisdiction in these matters is of special importance. Lobbying - providing timely and relevant information to legislators and governing boards - is a vital function in making institutional needs known.⁹² Administrators may also actively support or oppose legislative

action through letters sent to involved officials. Both individual letters and those sent by a professional organization representing higher education interests can impact legislative actions.

In dealing with the law and related litigation, an educational institution should consider the following recommendations made by the American Association of Community and Junior Colleges to carry out its newly-articulated mission "to provide national leadership of community-based, performance-oriented post-secondary education."⁹³ This organization recommends that a national mission statement for the community college be developed along with model legislation which lists the philosophy, purpose, and mission, which should be adopted by each state legislature. Secondly, the recommendation is made that every state provide for substantial local participation in policy and program operations, regardless of present state structure of control of colleges. Third, each state legislature should instigate a study of the overlapping jurisdictions of control groups which have developed as a result of federal and state policies, consolidating operations where possible. Fourth, AACJC recommends that community colleges work closely with the state agencies to eliminate the internecine warfare among institutions and regulatory agencies. Finally, the Association recommends "that community colleges become more involved in the political process by establishing and maintaining positive communications with state and national legislators residing in the service area and by generating strong power bases from alumni, community leaders, employers of graduates, businessmen, labor, and community groups."⁹⁴

In regard to the matter of preventive administrative actions in dealing with real or anticipated litigation, several solutions are suggested. Blummer states that administrators need to constantly review legal and professional literature, then consult with their counsel on the holdings and applicability.⁹⁵

Hopkins and Roha recommend that administrators develop positive programs of precaution against litigation, assess the statutes regarding sovereign immunity, consider programs for insurance, and consider increased indemnification.⁹⁶ Tarbert recommends total emphasis on the legal aspects of every phase of institutional management, centralized liability and loss control coordination, loss control and risk management, study of no-fault possibilities, and in-service education programs on the subject of legal matters.⁹⁷

O'Neil stresses that colleges seek judicial review of the many statutes, administrative regulations, exclusionary decisions, etc. He comments that this is a new role for colleges, but that they need to anticipate litigation over allocation of resources, and to consider the impact of suits on the conduct of campus affairs.⁹⁸ Another form of anticipatory action has to do with the increasing problems over campus security. Blummer and Witsil observed that accenting programs for greater security awareness and positive crime prevention can prevent some incidents for which the college could be held liable.⁹⁹ A sub-theme of Bender's research is a prescription for positive administrative action. His thesis was in support of a new role for the administrator known as advocacy, with an emphasis on preventive rather than on crisis management.¹⁰⁰

Situations that relate to First Amendment rights of faculty and students require constant planning and legal evaluation. The very tenuous legal doctrines and tests that surround this issue require planning and on-going analysis for the application of constitutional principles and the "consistent balancing of societal needs."¹⁰¹ Finally, Allshouse provides a very perceptive observation for administrators. His reflection is that courts are not ordinarily familiar with the complexities of higher education, so the avoidance

of litigation can prevent possibilities of bad precedents.¹⁰²

A recurring recommendation is for the administrator to utilize counsel. Rosenblum¹⁰³ and Epstein stress the need for having counsel, involving counsel in decisions, and the necessity of having counsel provide constructive advice and creative suggestions.¹⁰⁴ Lahti provides a model job description and evaluation instrument for institutional counsel.¹⁰⁵

A significant amount of litigation involves personnel management practices. Sensenbrenner and Richardson recommend that

policy be carefully considered to meet the needs of the campus. The development of an intelligent, well-considered policy will reduce administrative headaches in handling demands to open and close personnel records and increase the likelihood of success in the face of challenges to the policy.¹⁰⁶

The authors then follow-up with specific policy considerations.

Similarly, Bickel and Bender provide administrative guidance including constant review of statutory and case law, development of a personnel management program in a legally defensible framework within which all personnel can operate, development of guidelines for financial exigency, formulation of policy in anticipation of AA/EEOC actions, and review of personnel policies regularly in light of state and federal requirements, the contemporary mission, and specific situations confronting the college.¹⁰⁷ Additionally, they state that college administrators should seek to understand the legal problems involved in employment, evaluation, retention and non-retention of faculty and staff. "Publically known plans together with standards against which decisions can be made will be the best guarantee the courts will honor their professional judgements rendered in behalf of the institution."¹⁰⁸

St. John finds a need to study the issues relevant to collective bargaining, development of contracts, and development of a proactive strategy

for guaranteeing the administration of constitutional and contractual rights of a negotiated agreement.¹⁰⁹ Cohen and Associates develop a rationale for a sound faculty evaluation system.¹¹⁰ Roberts states the need for planning for the impact of the Equal Rights Amendment,¹¹¹ while Sandler and Sherman advocate planning to counteract sexism,¹¹² and planning for affirmative action.¹¹³ Fortney presents a fifteen point set of legal guidelines for administrative governance of faculty contracts and due process.¹¹⁴

Specific recommendations and proposed solutions for the personnel problems accompanying financial exigency are addressed by Wilde,¹¹⁵ Lombardi,¹¹⁶ and Allshouse. The latter provides several unique alternatives to include a national task force of trouble-shooters to address the technical aspects of financial exigency. He also states that institutions should assume responsibility for, among other things, sharper mission focus, changes in programs, staff and faculty retrenchment, to prevent the courts from finding negligence by administrators. He stresses responsive planning coupled with an effective formal evaluation system.¹¹⁷

Legalisms, they affect and involve students, have similarly been the focus of comment. Quann and others perceive the area of student rights as an opportunity for institutional progress,¹¹⁸ while Leslie and Satryb conclude that institutions must go further in providing student due process.¹¹⁹ Jackson and Richardson are of the opinion that more fairness is needed regarding the due process for students, that student personnel workers should take more initiative in this area, and that faculty should provide leadership for change.¹²⁰ The need for resolving problems of jurisdiction and the extent of formalized student disciplinary proceedings is highlighted by Karlesy and Stepheson.¹²¹ Hornbly develops a five point procedural system of guidelines

governing student admissions, stressing validation and due process in response to litigation involving discrimination and reverse discrimination.¹²² Shur and LeBlanc provide ten procedural guidelines for faculty members to protect themselves from potential liability.¹²³ And finally, Schafer supplies a series of procedural guidelines for colleges in cases of search and seizure.¹²⁴

A remaining area of concern with litigation is how to deal with outside pressures such as regulatory agencies, courts, and legislatures. Rosenblum originates guidelines for challenging arbitrary agency actions, for the exchange of information, for the use of counsel, and for the use of professional organizations to develop positive programs to cope with these pressures.¹²⁵ Blunmer describes alternatives for dealing with federal impositions and programs.¹²⁶ O'Neil suggests that the courts can be a tool for the institution against hostile external pressure and intrusions.¹²⁷

For the sake of brevity, this review of the literature for administrative solutions to legal problems has been concise. A thorough review and cataloging of issues and proposed solutions would be a worthwhile undertaking in support of college and university administrators.

Administrative Methods of Dealing with the Issue

Rather than examine an array of management/administrative styles, the following information prescribes one method that seems to have the greatest utility for dealing with change in the multi-purpose organization such as the community college. The most likely administrative approach in dealing with the issues of legislation and litigation in relation to higher education is the open systems model. This model is highly attractive because of its "organizational flexibility, defined as the ability to adjust to internal or

external change."¹²⁸

The open systems approach consists of various subsystems, including a management system, operating in what is often referred to as the environmental suprasystem. "The management system spans the entire organization by relating the organization to its environment, setting the goals, developing comprehensive strategic and operational plans, designing the structure, and establishing power processes."¹²⁹ As such, the management system is always sensitive and responsive to issues such as laws and litigation, that affect the organization.

Preemptive and positive administrative action to deal with legal matters is similar to two characteristics of the systems approach, feedback and adaptive and maintenance mechanisms.¹³⁰ These features are especially suited to dealing with taxing issues as is noted.

If the system is to survive, maintenance substructures must be elaborated to hold the walls of the social maze in place. Even these would not suffice to insure organizational survival however. The organization exists in a changing and demanding environment, and it must adapt constantly to the changing environmental demands. Adaptive structures develop in organizations to generate appropriate response to external conditions.¹³¹

Another quality of the systems approach is equifinality. Operationalizing the phrase 'there is more than one way to skin a cat,' it states that managers can use a varying bundle of inputs into the organization, can transform these in a variety of ways, and can achieve satisfactory output. Extending this view further suggests that the management function is not necessarily one of seeking a rigid optimal solution but rather one of having available a variety of satisfactory solutions.¹³²

The systems approach is particularly relevant to dealing with complex issues, external and internal, in times of rapid social and technological

change. An examination of certain futuristic literature provides selected thoughts concerning administration and the problem of coping with critical issues. Thorough elaboration of these concepts is beyond the parameters of this paper. The astute observer, however, may draw certain inferences for administrative style and technique through the study of the principles involved in the following concepts.

1. Boundary Expansion: One of the more dramatic trends in the future will be the development of systems-oriented approaches which can deal with broad social problems on a total rather than a piecemeal basis.
2. Interorganizational Analysis: There will be increasing emphasis in the future on problems related to the interface between organizations.
3. Social Forecasting: There will be techniques developed for social forecasting (what does man want?) seeking surprise-free projections for the future. These techniques will involve methods such as projection, probability forecasting, judgemental approaches, and analysis of models.
4. Social Indicators: There will be development of good historical and current information reflecting more sophisticated information of social conditions.
5. Adaptive-Organic Systems: This new organizational model, much more dynamic and flexible in its internal relationships than bureaucratic structure, will tend to be able to respond more effectively to environmental change.
6. Managerial Systems: Predictions are for the expanded role of administrative decision-maker; administration will be more complex; there will be increasing reliance and utilization of specialized knowledge; administration will be conducted in more flexible systems, and the ambiguities of the management position will create many role conflicts and severely test the psychological makeup of the incumbent.¹³³

These futuristic themes seem to emphasize the systems approach to administration previously described.

The complex legal problems of higher education institutions will not diminish in the future. Only through diligent awareness of the issues and

through an aggressive attack on problems as they arise can institutions maintain their intellectual equilibrium and integrity. The alternatives are not pleasant.

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